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**TESTIMONY OF EDWARD HALEALOHA AYAU, ESQ.**  
**NATIVE HAWAIIAN RECONCILIATION HEARINGS**  
**DECEMBER 1999**

*Aloha mai.* I wish to provide the following testimony in written form since I was not able to provide these comments orally at the O`ahu hearings. Since hours and hours of *mana`o* have already been shared by Native Hawaiians regarding the various means by which to reconcile the harm caused to us by the actions of the United States in the unlawful overthrow of our legitimate government in 1893, I have opted instead to focus on requesting an administrative remedy to a problem that profoundly affects Native Hawaiians, and North American Indian tribes and Alaska Natives. At the very least, the United States can support this request, and grant Native Hawaiian some relief as it strides for a more comprehensive response to the need for reconciliation. By providing this testimony, I by no means exhaust my right to continue to comment on the reconciliation needs of Native Hawaiians in re to the United States. Granting this request is only a start, albeit an excellent one.

I provide this testimony principally as a member of the Ayau, Hapai, and Ka`eo families, and secondarily as a member of Hui Malama I Na Kupuna O Hawai`i Nei (Hui Malama). I have been a member of Hui Malama for 10 years, and have helped with the repatriation of over 5,000 ancestral Native Hawaiian remains and funerary objects from Federal agencies and federally funded institutions pursuant to the authority of the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>1</sup> The problem and remedy I propose as part of the overall reconciliation process are directly related to NAGPRA, more specifically, it's implementation by the National Park Service and the inherent problem that partnership has created.

### **The Conflict of Interest Problem**

I am deeply concerned about the treatment of Native Hawaiian ancestral remains and cultural items that are subject to consultation and repatriation pursuant to NAGPRA. When Congress enacted NAGPRA, it sought to define private property rights in these and other cultural items including sacred objects and items of cultural patrimony, while carefully attempting to balance the interests of science, museum ownership, and Native American and Native Hawaiian rights and responsibilities to their ancestral past. Congress placed the responsibility for NAGPRA implementation with the Secretary of the Department of Interior who in turn delegated the authority to the National Park Service, Archaeological Assistance Division. It seemed to make sense at the time. However, the problem this created is an inherent conflict of interest because the National Park Service is also responsible for complying with NAGPRA's provisions. Therefore, the agency in charge of assuring compliance and enforcement is allowed to stand in judgment of itself and similar National Parks across the country under the current administrative scheme-- an arrangement that needs to change.

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<sup>1</sup> I have attached a repatriation report that summarizes our activities over the past 10 years.

Further complicating this situation is that the National Park Service also serves as staff to the NAGPRA Review Committee that is statutorily charged with helping to address disputes, and fashion meaningful resolutions between the parties. Hence, a conceivable scenario is one where a tribe files a claim with a National Park for cultural items covered by NAGPRA, the National Park in turn denies the claim, the tribe appeals the decision to the NAGPRA Review Committee as a dispute and requests resolution procedures be commenced, and the staff preparing the matter for the NAGPRA Review Committee belongs to the same agency as one of the parties to the dispute. As a result, there exists an inherent conflict of interest.

One reason for concern by Hui Malama is a pending NAGPRA case with Volcanoes National Park. In that case, Hui Malama filed a claim with Volcanoes National Park (VNP) for associated funerary objects that the VNP has that were removed from burial caves in Kawaihae. Bishop Museum has NAGPRA responsibility for the *iwi kupuna* (ancestral remains) and *moe pu* (funerary objects) from this same cave and has already gone on record as agreeing to repatriate pursuant to NAGPRA as human remains, associated and unassociated funerary objects. However, VNP in Hawai'i who learned of the pending claim to these cultural items, notified their D.C. counterparts in the NAGPRA Program about their concerns over the pending repatriation claim. Moreover, VNP has yet to officially reply to the request.

Conceivably, the VNP could deny the repatriation claim and Hui Malama would no doubt appeal the decision to the NAGPRA Review Committee as a dispute and request resolution procedures be commenced. The staff in charge of preparing the matter for the NAGPRA Review Committee's consideration and for drafting the recommendations provided by the Committee, would be the same D.C. counterparts that the VNP staff already alerted regarding this claim. This is a problem because on its face is the appearance of impropriety and the fear of loss of fairness and objectivity.

Although at this writing, the aforementioned is but a hypothetical, the mere fact that it could become a real life problem is reason enough to consider making an administrative change. As Assistant Secretary Berry already knows all too well, there are more than one case in which this conflict has already arisen amongst Indian tribes including the Chaco Canyon case involving the Hopi Tribe and the Zuni Pueblo tribe's dispute with Chaco Canyon National Park.

As we see it, the conflict of interest has two facets. First, administration by the position that is also responsible for the nation's archaeology program (Departmental Consulting Archaeologist being in charge of the NAGPRA Program, a program that also calls for the mediation of archaeological interests), and second, administration by an agency (NPS) that must also comply with the provisions of NAGPRA. The proposed remedy must effectively address both facets of the problem.

## Hui Malama Efforts to Address the Conflict of Interest Problem

In recognition of this problem, the Board of Directors of Hui Malama I Na Kupuna O Hawai'i Nei passed Resolution 98-002<sup>2</sup> calling for the permanent separation of the NAGPRA Program responsibilities from the Departmental Consulting Archaeologist and redelegation to a neutral agency within the Department of Interior that is not compelled to comply with NAGPRA because it is not responsible for any collections of cultural items (so it does not have to do inventories, summaries, consultation, and repatriation), and it does not manage any federal lands (so there is no concern for compliance with the inadvertent discovery or intentional excavation requirements).

Furthermore, we urged the Senate Indian Affairs Committee last spring to hold an oversight hearing on this matter and the overwhelming testimony from tribes, as well as NAGPRA scholars was that there is a clear conflict of interest with the National Park Service implementing NAGPRA and being subject to complying with it.<sup>3</sup> Moreover, the witnesses urged Congress to recommend to the Secretary of Interior that the NAGPRA Program be reassigned to a neutral agency within Interior. Despite this clear directive, the Secretary of Interior has not taken any such corrective action.

## The Proposed Administrative Remedy

Hui Malama strongly urges the Secretary of Interior to redelegate the NAGPRA Program completely away from the National Park Service Archaeological Assistance Division to a completely neutral agency. We recommend that the NAGPRA Program be redelegated to the **Office of Policy, Management, and Budget (PMB)** because the PMB meets the requisite neutrality criteria of not having responsibility for NAGPRA compliance due to a lack of management of federal collection of cultural items or federal lands. The neutrality of the PMB will help restore the integrity of this process to all the parties involved. In addition, Hui Malama would object to any separation of NAGPRA responsibilities amongst different agencies, especially if the NPS continues to play any administrative role. Furthermore, Hui Malama recommends that the current staff of the NAGPRA Program be consulted for input on how best to conduct the redelegation in order to mitigate any negative effects on national implementation. This will help assure the smooth transition of the NAGPRA Program responsibilities and staff to PMB.

## Conclusion

*Mahalo nui* for the opportunity to testify. I look forward to a positive response, and an ongoing dialogue with officials of the United States that will result in an equitable resolution for Native Hawaiians who have suffered as a result of American intervention in our sovereign affairs. Although this is but a small remedy to a much larger problem, to the extent that it positively affects ancestral, living and yet to be born Hawaiians, it is most profound in its scope, and certainly a remedy that at the very least the United States can start with if they are truly serious about reconciliation. *Ola na iwi* (the bones live).

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<sup>2</sup> I have appended the Hui Malama resolution to this document.

<sup>3</sup> I have appended the testimony of Judge Sherry Hutt that identifies the conflict of interest and reiterates the need to redelegate in order to preserve the integrity of the NAGPRA process.